No. 93-518

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

FLORENCE DOLAN,
Petitioner,

v.

CITY OF TIGARD,
Respondent.

On Writ Of Certiorari
To The Oregon Supreme Court

BRIEF OF THE WASHINGTON LEGAL FOUNDATION, PENNSYLVANIA LANDOWNERS' ASSOCIATION, INC., AND THE ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Daniel J. Popeo
Paul D. Kamenar
(Counsel of Record)
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, D.C. 20036
(202) 588-0302

Date: January 13, 1994

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page**

Constitution and Statutes:

Miscellaneous:

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

No. 93-518

FLORENCE DOLAN,
Petitioner,

v.

CITY OF TIGARD,
Respondent.

On Writ Of Certiorari
To The Oregon Supreme Court

BRIEF OF THE WASHINGTON LEGAL FOUNDATION, PENNSYLVANIA LANDOWNERS' ASSOCIATION, INC., AND THE ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a national nonprofit public interest law and policy center with over 100,000 members and supporters nationwide, many of whom are small business owners and property owners who are subjected to a variety of exactions imposed by regulatory authorities at the local, state, and federal level as conditions on the reasonable use of their property. WLF devotes a substantial portion of its resources to litigating cases dealing with property rights in this and other courts. *See, e.g., Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2887 (1992). More pertinently, WLF appeared as an *amicus* in the instant case before the Oregon Supreme Court and in this Court in support of

granting the petition, and can bring a broader perspective to the issues than the parties before this Court.

The Pennsylvania Landowners' Association, Inc. (PLA) is a not-for-profit corporation dedicated to the protection of property rights and economic opportunity while promoting responsible environmental stewardship. Formed in 1987, the PLA is based in Waterford, Pennsylvania, and has also filed an *amicus* brief in *Lucas*.

The Allied Educational Foundation (AEF) is a nonprofit charitable and education foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, including law and economics, and has appeared before this Court as an *amicus* with WLF in *Lucas*, in the instant case in support of the petition, and in other constitutional cases.

This brief is filed with the written consents of the parties which are on file with the Clerk of the Court.

INTRODUCTION AND STATEMENT OF THE CASE

In the interests of judicial economy, *amici* Washington Legal Foundation, *et al.*, adopt by reference the statement of the case as presented in the brief filed by Petitioner Florence Dolan. Nevertheless, *amici* will briefly present those aspects of the case that are pertinent to the arguments presented in this brief.

The Petitioner, Florence Dolan, owns a 1.67 acre commercial lot on Main Street in the City of Tigard, Oregon. The lot is currently occupied by a 9700 square foot building used for the operation of a retail electric and plumbing supply store. The lot is contiguous to Fanno Creek, a small stream that runs adjacent to the lot. Petitioner and her late husband, John T. Dolan, proposed to expand their business by tearing down the existing building and by erecting a new 17,600 square feet building more suited to their needs and the needs of their customers. Together with her late husband, Petitioner

applied to the city for the appropriate permits. The city was disposed to grant the permits but also imposed certain conditions on their issuance, one of which is the subject of this appeal.[1] More particularly, the City required as a condition for site plan approval that the Dolans dedicate to the city: (1) all of the portions of their lot lying within the 100-year floodplain, for use by the city as a greenway; and, (2) an additional 15 foot strip of property adjacent to and above the 100-year floodplain, for use for future reconstruction of a storm drainage channel and as a public pedestrian/bicycle pathway.

The Dolans initially appealed the permit conditions to the Oregon Land Use Board of Appeals (LUBA) alleging a violation of the Fifth and Fourteenth Amendments to the United States Constitution. LUBA dismissed this appeal, however, because, in its view, the Dolans' federal constitutional claim was not yet "ripe." LUBA was of the opinion that this Court's decisions in *MacDonald, Sommer, Frates v. Yolo County*, 477 U.S. 340, 348 (1986) and *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 189 (1985) precluded Mrs. Dolan from seeking judicial relief "*if* the variance process... is an available administrative means for petitioners to seek relief from the disputed condition..." *See Dolan v. City of Tigard*, 20 Or. LUBA 411, 425-426 (1991); Pet. App. E-15, E-18 (emphasis in original). [2] The Dolans dutifully

---

[1] In addition to the dedication requirements at issue in the case at bar, the city also imposed separate impact fees in excess of $14,000 for transportation and stormwater runoff management, and it required the Dolans to relocate the "footprint" of their building to accommodate the future relocation of the floodplain bank of Fanno Creek. *See* Pet. App. G-15, G-44, G-45.

[2] While the Dolans have complied with LUBA's variance requirement and the issue is not now before this Court, *amici* nevertheless do not believe that LUBA correctly construed this Court's decisions. While variances are a common feature of modern land use law, they generally are provided, and require the applicant to demonstrate, that the hardship complained of is unique to a particular parcel and not

(continued...)

applied to the city for a variance which was denied by the city. Mrs. Dolan then initiated this appeal which was successively rejected by LUBA, the Oregon Court of Appeals and now by the Oregon Supreme Court, sitting *en banc*. Mrs. Dolan now appeals to this Court.

In 1973, the State of Oregon enacted a law requiring local governments to adopt comprehensive land use plans in compliance with statewide land use goals. One of the state land use goals, Goal 5, requires local governments to provide programs to protect, *inter alia* "[l]and needed or desirable for open space." Pet. App. I-1. Another goal, Goal 12, requires local governments to adopt a plan providing for a safe, convenient and economic transportation system which would "consider all modes of transportation including... bicycle and pedestrian." Pet. App. I-2. State law does not prescribe any particular means of achieving these noble goals; however, concerning open space, it does encourage local governments to use "fee acquisition...preferential assessment, development rights acquisition and similar techniques...." Pet. Brief on the Merits at A-5.

---

[2](...continued)
shared generally by other properties in the zoning district. Thus, § 18.134.050.A.2. of the Tigard, Or. Community Development Code required Mrs. Dolan to show that there were "special circumstances that exist[ed] which are peculiar to the lot size or shape, topography or other circumstances over which the applicant has no control, ***and which are not applicable to other properties in the same zoning district*** (emphasis added)." The case at bar concerns a blanket exaction that "plunder[s] landowners generally," *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2887, 2899 n. 14, (1992), who happen to own land within the restrictive geographic region of Fanno Creek. Furthermore, not only was Petitioner's application for a variance futile, but even if the city had granted Petitioner's application, that would have done nothing to cure the underlying constitutional defect in the ordinance here subject to challenge, though it might have relieved the burden of this one individual property owner. *See, e.g., Simpson v. City of North Platte*, 206 Neb. 240, 292 N.W.2d 297, 299 (1980) (rejecting an administrative exhaustion defense under comparable circumstances).

The city has adopted a comprehensive land use plan to comply with the requirements of state law. The plan, last revised in 1983, includes a finding that the city would develop policies to retain "a vegetative buffer along streams and drainageways, to reduce runoff and flood damage and provide erosion and siltation control." Pet. App. J-1. The city's plan for Fanno Creek proposes to implement this noble policy by requiring the "dedication of all undeveloped land within the 100-year floodplain plus sufficient open land for greenway purposes specifically identified for recreation within the plan." Pet. App. J-1, 2. The dedication requirement applies to all proposals for development along Fanno Creek irrespective of the extent to which the proposals contribute to the need for the land dedicated or the portion of the tract that is located within the 100-year floodplain.

The question presented concerns principally the proper interpretation of this Court's decision in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), which all parties concede controls the case at bar. To justify its exaction in this case, the city has made a series of "findings" which it believes establishes that the dedication requirements are "reasonably related to the applicant's request to intensify the development of this site."[3] The "findings" fairly establish that Petitioner's proposed intensified use of the site may contribute in at least some degree to the city's general need for additional improvements to its transportation infrastructure (including pedestrian/bicycle pathways), and for public stormwater management in the Fanno Creek watershed. But the "findings" do not attempt further to qualify or quantify this contribution. Nor do they explain why Mrs. Dolan's contribution to the city's transportation, open space and stormwater management requirements exceeds the amount

---

[3] The city's "findings" are quoted extensively by the majority and dissenting opinion's of the Oregon Supreme Court. *See* Pet. App. A-5, A-8; A-19, A-23.

covered by the impact fees which the city has already imposed for the same basic purpose.[4]

In its decision, the majority of the Oregon Supreme Court rejected Mrs. Dolan's contention that *Nollan v. California Coastal Comm'n*, *supra*, established a heightened standard of judicial scrutiny for exactions. In the majority's view, *Nollan* "tells us that an exaction is reasonably related to an impact if the exaction serves the same purpose that a denial of the permit would serve." Pet. App. A-15. Because the city's findings establish that Petitioner's intensified use of her land will contribute in at least some degree to the city's transportation, open space

[4] *See* note 1, *supra*. This example of regulatory "double-dipping" is uncommon in the sense that here, it is the same government agency which is seeking to justify two exactions based on essentially the same need. A more common practice is for different levels of government (*e.g.*, state and local, or state and federal) to each exact their sum, in land or money equivalent, while pointing to the same need as justification. In addition, two or more exactions are sometimes justified by giving the same need a different name, for example, by exacting a sum for open space needs, and then by exacting an additional sum for loss of general wildlife habitat. An extreme and particularly insupportable example of regulatory "double-dipping" is provided by Maryland's Forest Conservation Act (§ 5-1601 *et seq.* of the Natural Resources Article, Annotated Code of Maryland). The Act's afforestation requirement mandates, by means of a complex formula, the establishment and preservation, via covenants or other restrictive instruments (*see* § 5-1607(e)(2) of the Natural Resources Article) of between ¼ to 2 acres of forest land for each acre of forest land disturbed by development or other use of land (including land that currently has no forest on it). By committee amendment, the provisions of the Act, including afforestation, were made to apply also to "the area ***that is required by the local authority to be cleared of forest*** to meet certain recreational and open space requirements" and "the area ***that is necessary*** for the construction of stormwater management retention or detention facilities." Senate Bill No. 224, Chapter 225 of the Acts of 1991, The Laws of Maryland (p. 6, lines 10-18, and 25-32, striking proposed exemptions for these activities) (emphasis added). In view of the complexity of modern regulation, a "heightened" level of judicial scrutiny should require a reviewing Court to look not only at the individual regulation being called into question, but also at the cumulative impact of other applicable regulations affecting the use of land.

and stormwater management needs, the Oregon Supreme Court concluded that the city had satisfied its burden under *Nollan* to go forward with evidence sufficient to establish an "essential nexus" between the exaction and Petitioner's use of her land.

Justice Peterson dissented from the majority view. *See* dissenting opinion of Justice Peterson, A-17 *et seq*. In his dissenting opinion, Justice Peterson decried the facile and conclusory nature of the city's findings, which, while clearly demonstrating, in his view, the city's resolve to get the easements, failed to establish anything more than a speculative connection between the Petitioner's proposed use of her land and the need for the exactions. Citing the passage from *Nollan* which states that this Court views "the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination," 483 U.S. at 841, Justice Peterson concluded that the *Nollan* decision required more than the "theoretical nexus" established by the city's findings in the case at bar. Pet. App. A-19.

ARGUMENT

I. THIS COURT SHOULD ADOPT THE RATIONAL NEXUS TEST AS THE STANDARD FOR EVALUATING THE VALIDITY (WITHOUT JUST COMPENSATION) OF REGULATIONS THAT REQUIRE THE DEDICATION OR RESERVATION OF LAND (OR MONEY EQUIVALENT) AS A CONDITION FOR THE APPROVAL OR ISSUANCE OF PERMITS OR PLANS REGULATING THE USE OF LAND.

A. Most Courts Have Required The Application Of Some Standard Of Proportionality To Justify Developmental Exactions

The law of developmental exactions may be traced back to the subdivision platting statutes of the late nineteenth century which originally were developed to facilitate

the conveyance of land by reference to recorded plats instead of by metes and bounds.[5] Since at least the beginning of the nineteenth century, American cities have attempted to promote orderly growth by adopting general plans or maps specifying the desired location of future streets and parks, market places, drainage facilities, and other forms of public infrastructure.[6] But without some means of controlling the subdivision of land, these plans remained of little avail. Since a subdivision plat was already checked for accuracy before recordation, this must have seemed a logical point to control whether other rational planning requirements had been met.

Originally, adequate land was reserved for projected public improvements at the time of subdivision plat approval. The land was then opened using the power of eminent domain. Many states followed the practice of awarding just compensation as determined by a sheriff's jury, "'taking into consideration all conveniences and inconveniences, advantages and disadvantages arising [from the taking]', or 'all benefits and inconveniences'."[7] Revenues were then raised to meet the costs incurred by the exercise of eminent domain by means of special

---

[5] *See* Kean, *Money Payment Requirements as Conditions to the Approval of Subdivision Maps: Analysis and Prognosis*, 9 Villanova L.R. 294, 296 (1964); and Johnston, *Constitutionality of Subdivision Control Exactions:The Quest for a Rationale*, 52 Cornell L.Q. 871 (1967)(hereinafter cited as "Johnston").

[6] *Bauman v. Ross*, 167 U.S. 548 (1897) notes that the general plan for Washington, D.C. was established in 1791 under the direction of President Washington. By an act of Congress of 1809, the proprietor of any lot or square in the Washington, D.C. was authorized to have it subdivided on submitting a plat of the proposed subdivision to the surveyor of the District of Columbia for certification and recordation.

[7] *Bauman v. Ross*, 167 U.S. at 566. In other words, when a part of a person's property was taken for a public improvement, the eventual award of damages would be reduced in proportion to the estimated increase in market value of the remainder of the person's property attributable to the improvement.

assessments levied, sometimes during the same proceedings, on those deemed specially benefited by the improvements.[8] At some point in time, it occurred that it might be more efficient to require the developer to both dedicate land for and to actually install the needed public improvements as part of the subdivision and development process. This was sometimes justified under the assumption that the developer would pass on the costs to those specially benefited by them, *i.e.*, the future subdivision residents.[9]

But while judicial scrutiny of subdivision control exactions dates back to the late nineteenth century,[10] most modern treatments of the subject begin with *Ayres v. City Council of Los Angeles*, 34 Cal.2d 31, 207 P.2d 1 (1949).[11] In *Ayres*, the California Supreme Court upheld a municipal street exaction because it found the need for the street to be "***reasonably related*** to increased traffic and other needs of the proposed subdivision." *Id.* 207 P.2d at 8 (emphasis added). *Ayres* has given rise to widely diverging interpretations, however. In *Parks v. Watson*, 716 F.2d 646, 651 (9th Cir. 1983), the Ninth Circuit Court of Appeals presented *Associated Home Builders of Greater East Bay, Inc. v. City of Walnut Creek*, 94 Cal Rptr 630, 4 Cal.App.3d 633, 484 P.2d 606 (1971) and *Pioneer Trust and Sav. Bank v. Village of Mount Prospect*, 22 Ill.2d 375, 176 N.E.2d 799 (1961) as paradigmatic of the two poles in the modern debate over developmental exactions.

---

[8] *See Norwood v. Baker*, 172 U.S. 269 (1898) for a collection of early cases dealing with special assessments.

[9] *See Divan Builders, Inc. v. Planning Bd. of Tp. of Wayne*, 66 N.J. 582, 334 A.2d 30, 39 (1975).

[10] *See* Johnston, *supra* note 5, at 876-886.

[11] Hagmen, *Urban Planning and Land Development Control Law*, at 254 (1975) refers to *Ayres* as the "leading case on subdivision exactions."

Ironically, both of these decisions present themselves as relying on *Ayres*.

While the schema presented by *Parks* is probably an oversimplification, it will nevertheless serve as an adequate basis for framing the issue in this case. At the one extreme stands the approach taken by the California courts prior to *Nollan*, which has now been adopted by the Oregon Supreme Court. As originally enunciated in *Associated Home Builders of Greater East Bay, Inc. v. City of Walnut Creek*, *supra*, and later refined in *Grupe v. California Coastal Comm'n*, 212 Cal.Rptr. 578, 166 Cal.App.3d 148 (1985), the California courts held that a developmental exaction need not be directly related to the needs created by a developer's activity to be sustained. It is enough that the developer, either by himself, or in conjunction with others, contributes generally to the needs toward which the exaction is directed, even if his development itself derives no benefit from the exaction. In *Grupe*, the plaintiff's beach-front home was "one more brick in the wall separating the People of California from the state's tidelands." 212 Cal.Rptr. at 589 & n.11. As far as the California courts were concerned, that settled the matter.

At the other end of the judicial spectrum stands the approach taken by the Illinois Supreme Court in *Pioneer Trust and Sav. Bank v. Village of Mount Prospect*, *supra*. According to the Illinois Supreme Court, a developmental exaction is valid only if the burden cast on the developer is "specifically and uniquely attributable to his activity." 176 N.E.2d at 802. Thus, the need alleviated by the exaction must be created solely by the developer's activity and the benefit derived from the exaction must accrue solely to the assessed property. The Illinois Supreme Court has been followed by a number of leading cases. *See Billings Properties Inc. v. Yellowstone County*, 144 Mont. 25, 394 P.2d 182 (1964); and *Frank Ansuisi, Inc. v. City of Cranston*, 107 R.I. 63, 264 A.2d 910 (1970).

The California rule places a heavy burden upon the developer to show that a particular exaction has *no* relationship whatsoever to a proposed development project. While it is more flexible than the old Illinois rule, it is also allows local governments "almost unlimited discretion in the imposition of dedication requirements." *Wald Corp. v. Metropolitan Dade County*, 338 So.2d 863, at 866 (Fla.D.C.A. 1976). The old Illinois rule, on the other hand, does substantially reduce the potential for taking by subterfuge, but places a heavy burden on municipalities to show a *specific* connection between a particular subdivision and a specific street or park or school. This task is especially difficult with regard to small residential subdivisions which contribute to the need for parks or roads or schools, but which lack sufficient land to dedicate for those purposes. The rigidity of the old Illinois rule explains why most courts have sought to find a middle ground between the two extremes.[12]

Within the middle of the spectrum of judicial thought, at least two --in their origins-- distinct schools may be identified. The first is the approach taken by the Wisconsin Supreme Court in *Jordan v. Village of Menomonee Falls*, 28 Wis.2d 608, 137 N.W.2d 442 (1965), *appeal dismissed*, 385 U.S. 4 (1966), and its progeny.[13] *Jordan* concerned the validity of an impact fee for parks and schools. The Wisconsin Supreme Court recognized that it was unrealistic to expect a municipality to show that a proposed exaction was *exclusively* attributable to a specific subdivision. While it retained the term "specifically and

---

[12] The Illinois courts have themselves recently abandoned their old rule in favor of a more flexible "proportional and specifically attributable" standard. *Plote, Inc. v. Minnesota Alden Co.*, 52 Ill. 550, 96 Ill.App.3d 1260, 422 N.E.2d 231 (1981).

[13] *See Aunt Hack Ridge Estates, Inc. v. Planning Commission*, 160 Conn. 109, 273 A.2d 880 (1970); *Collis v. City of Bloomington*, 310 Minn. 5, 246 N.W.2d 19 (1976); *Briar West, Inc. v. Lincoln*, 206 Neb. 172, 291 N.W.2d 730 (1980); and *Call v. West Jordan*, 614 P.2d 1257 (Utah 1980).

uniquely attributable" as the proper yardstick for measuring the validity of exactions, it nevertheless noted that this standard was not to be applied too strictly so as to cast an unreasonable burden on municipalities.

The second school of thought occupying the broad middle ground is that taken by the New Jersey courts as exemplified by *Longridge Builders, Inc. v. Planning Board of Princeton Township*, 52 N.J. 348, 245 A.2d 336 (1968); and *181 Incorporated v. Salem County Planning Board*, 133 N.J.Super. 350, 336 A.2d 501 (1975). *See also*, *Simpson v. City of North Platte*, 206 Neb. 240, 292 N.W.2d 297 (1980). In the typical New Jersey case, a road or some similar public improvement is projected on an official map or plan. As fate would have it, the projected infrastructure intersects a particular parcel of land proposed for development, or at least it is close enough that the development can be said in some sense to require it. The question, of course, is under what circumstances can the developer be forced to pay for the needed infrastructure? The answer of the New Jersey courts has been twofold. First, there must be a "substantial, demonstrably clear and [temporally] present" connection to the development project and the prospective infrastructure. *181 Incorporated*, *supra*, 336 A.2d at 506.[14] Second, the costs of the proposed improvement must be properly apportioned between the developer and the public. "[A subdivider may] be compelled only to bear that portion of the cost which bears a rational nexus to the needs created by, and benefits conferred upon, the subdivision." *Longridge Builders, Inc. v. Planning Board of Princeton Township*, 245 A.2d at 337. Generally speaking, it may be said that the rules for the allocation of the costs are derived from the law of special assessments. *See Divan Builders, Inc. v. Planning Bd. of Tp. of Wayne*, *supra*, 334 A.2d at 39.

---

[14] This is sometimes called a "cause and effect" relationship. *Pennell v. San Jose*, 485 U.S. 1, 20 (1988) (Scalia, J., dissenting).

The use of the term "rational nexus" within the context of developmental exactions would seem to have been popularized by Johnston, *supra*, note 5. The term does not occur in *Jordan* or the earliest cases following *Jordan*. Nor does it occur in any of the New Jersey cases prior to *Longridge*. In the first few decisions that do employ the term, it usually occurs in a quote or at least while citing Johnston.[15] Nevertheless, since *Wald Corp. v. Metropolitan Dade County*, *supra*, it has become customary to refer to both the *Jordan* and New Jersey schools in rather syncretistic fashion as the "rational nexus test" without further qualification.[16]

While the *Jordan* and New Jersey schools differ with regard to their historical origins, they are united by two factors which also serve to distinguish them from the approach taken by the California courts prior to *Nollan*. First, they place a substantial though not unreasonable burden on the municipal government to justify its exactions. *See Collis v. City of Bloomington*, 246 N.W.2d at 25 ("Standards can be developed and supported only after considerable data have been gathered and carefully analyzed"). *See also* Johnston, *supra* note 5, at 924. Second, they require a proper allocation of the public and private costs of proposed improvements, except in those circumstances where a particular development project, or group of projects, is the sole beneficiary of the projected improvements.[17]

---

[15] *See, e.g., Collis v. City of Bloomington*, 246 N.W.2d at 24; and *Longridge*, 245 A.2d at 237.

[16] *See Wald*, *supra*, 338 So.2d at 867-868; and *Howard County v. JJM, Inc.*, 301 Md. 256, 280-81, 482 A.2d 908 (1984). *See also Batch v. Town of Chapel Hill*, 92 N.C.App. 601, 376 S.E.2d 22 (1989), *rev'd on other grounds*, 387 S.E.2d 655 (N.C. 1990).

[17] With regard to impact fees, definite rules have been established to prevent the commingling of funds and to ensure that funds are in fact expended within a reasonable period of time for the purposes for which they were ostensibly raised. *See Hollywood, Inc. v. Broward*

(continued...)

There are also numerous cases which do not fit easily into any particular school of thought. In *Gulest Ass'n v. Town of Newburgh*, 25 Misc.2d 1004, 209 N.Y.S.2d 729 (Super. Ct. 1960), *aff'd*, 15 A.D.2d 815, 225 N.Y.S 538 (App. Div. 1962), for example, a New York Court employed a "direct benefit" test, a term evidently borrowed from the law of special assessments. In *Swing v. Baton Rouge*, 249 So.2d 304 (La.App.), application denied, 259 La. 770, 252 So.2d 667 (1971), a Louisiana court declared a street exaction invalid because the proposed extension of the street served the "primary benefit" of the public at large. In *Home Builders Association of Greater Kansas City v. City of Kansas*, 555 S.W.2d 832, 835 (Mo. 1977), the Missouri Supreme Court held that a park dedication requirement or impact fee could be sustained so long as the burden cast on the developer was "reasonably attributable" to the developer's activity. In *Lampton v. Pinaire*, 610 S.W.2d 915 (Ky. App. 1980), a Kentucky court declared a street exaction reasonable so long as it was based on the "reasonably anticipated burdens" to be caused by the development. In *City of College Station v. Turtle Rock Corp.*, 680 S.W.2d 802 (Tex 1984), a Texas court adopted a "reasonable connection" standard to assess the validity of a park exaction, citing the American Law Institute's *Model Land Development Code* § 2-103 at 38 (1976).

While a few of the cases which we have cited above place the burden on the developer challenging an exaction to show that the necessary connection to the needs created by the developer's own activity is not present, *see*, *e.g.*,

---

[17](...continued)
County, 431 So.2d 606, 612 (Fla. 4th DCA), *rev. denied*, 440 So.2d 352 (Fla. 1983). *See also*, *Banberry v. South Jordan City*, 631 P.2d 899, 903-904 (Utah 1981). Anyone who is familiar with the budgetary process understands how easily moneys reimbursed to the General Fund tend to "disappear" in the course of a fiscal year. Thus, money, precisely because it is *fungible*, is more easily diverted than land to purposes other than those for which it was ostensibly exacted. For this reason, monetary exactions pose an even greater risk of taking by subterfuge than do exactions of real property and should be subject to a comparable, if not higher, level of scrutiny.

City of College Station v. Turtle Rock Corp., *supra*; *Call v. West Jordan*, *supra*; *Billings Properties Inc. v. Yellowstone County*, *supra*; and *Jenad, Inc. v. Scarsdale*, 18 N.Y.2d 78, 271 N.Y.S.2d 955, 218 N.E.2d 673 (1966),[18] virtually all of the cases outside of California,

---

[18] Most commentators have noted how *Nollan* placed the burden on government of going forward with legally sufficient evidence to establish an "essential nexus." *See*, *e.g.*, Williams, 1 *American Land Planning Law*, § 5A.04, at 140, 142 (1988) ("[T]he proposed reversal of the presumption [ordinarily accorded government regulations] footnoted by Justice Scalia... is really startling"); and Mandelker, *The Shifting Presumption of Constitutionality in Land-Use Law*, in Young, *1991 Zoning Law Handbook*, 409, 419 (1991). Unfortunately, *Nollan* failed to provide a rationale for applying presumption-shifting within the context of developmental exactions. While official acts, including the decisions of land use planners, are presumed valid and the ***initial*** burden is ordinarily on the one challenging those acts to go forward with evidence sufficient to permit the court to find otherwise, the practice of shifting this presumption onto government has occurred in a surprising variety of circumstances. For example, presumption-shifting has long been applied within the context of nuisance law when a governmental act has effected the summary confiscation or destruction of property. *See Applestein v. Baltimore*, 156 Md. 40, 49, 143 A. 666 (1928) (citing cases). *See also*, 31A *C.J.S* § 146, at 357 (1964). Common law also applies presumption shifting where the jurisdiction of an administrative or quasi-judicial agency is limited and depends upon the occurrence of specific facts prescribed by law. *Ibid.* In footnote 4 of *United States v. Carolene Products Co.*, 304 U.S. 144, 58 S Ct 778, 82 L Ed 1234 (1938), this Court opined that presumption-shifting might be appropriate "when legislation appears on its face to be within a specific prohibition of the Constitution... [or when legislation] restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation." *Ibid*, 304 U.S. 152 n.4; *see also*, *Lucas v. South Carolina Coastal Council*, 112 S.Ct. at 2893 n. 6 ("Our analysis presumes the unconstitutionality of state land-use regulation only in the sense that *any* rule—with—exceptions presumes the invalidity of a law that violates it"). Footnote 4 of *Caroline Products* has received a good deal more attention among commentators than courts, however. *See generally*, Mandelker, *The Shifting Presumption*, *supra*.

Within the developmental exaction context, presumption- shifting was assumed by the Wisconsin Supreme Court in *Jordan*, *supra*, and later endorsed by Professor Johnston, *supra* note 5 at 924, and has subsequently been followed by other courts adopting the rational nexus

(continued...)

and now Oregon, require some fair standard of apportionment of costs in accordance with the public and private contribution to the need for a public improvement. In most instances, these cases draw either explicitly or implicitly on the language of special assessments. *See, e.g., Bethlehem Evangelical Lutheran Church v. Lakewood*, 626 P.2d 668, 672 (Colo. 1981) ("The theory upon which the owner of the property abutting a street may be required to pay the costs of public improvements... is that the property is ***especially*** benefited by the improvements over and above the general benefit to the public at large")(emphasis in original).[19]

In the case at bar, both the majority and dissenting opinions of the Oregon Supreme Court acknowledge that *Nollan* requires the city to go forward with evidence that is legally sufficient to establish an "essential nexus"

---

[18](...continued)
as the legal standard for judging the validity of exactions. *See, e.g., Howard County v. JJM, Inc.*, 301 Md. at 282 (invalidating a highway exaction because, "No such nexus has been shown [by the government] here"). Also to be noted is that this Court considered the "essential nexus" in *Nollan* as a potential ***affirmative defense*** at a time when it already had been persuaded that the forced dedication of a beach access easement otherwise would constitute a taking. *See Nollan*, 483 U.S. at 831 ("Had California simply required the Nollans to make an easement across beachfront available to the public on a permanent basis in order to increase public access to the beach... we have no doubt there would have been a taking"); *see also, Lucas v. South Carolina Coastal Council, supra*, 112 S.Ct. at 2925-26 (Souter, J., statement) (characterizing the majority opinion as a discussion of defenses to just compensation claims). In the case at bar, the city is requiring Mrs. Dolan to formally convey title to a portion of her land. Absent more, this usually constitutes a compensable taking. *See Yee v. City of Escondido*, 112 S.Ct. 1522, 1526 (1992) ("Where government authorizes a physical occupation of property (***or actually takes title***), the Takings Clause generally requires compensation") (emphasis added).

[19] The Oregon Supreme Court has itself acknowledged that a special assessment cannot be upheld without "some system of *just apportionment*." *MacVeagh v. Multnomah County*, 126 Or. 417, 270 P. 502 (1928) (emphasis added).

between the exaction and Mrs. Dolan's proposed use of her land. *See* Pet. for Cert., App. A-18 (Petersen, J. dissenting) ("As does the majority, I place the burden of proving these two elements [of *Nollan*'s nexus test] on the government that exacts the conditions"). And, in fact, the city has gone forward with certain "findings" which it believes satisfies the *Nollan* nexus requirement. The majority on the Oregon Supreme Court held that the city's findings sufficed as a matter of law to establish the required *nexus*.[20] The question is now before this Court as to whether the Oregon courts have applied the proper legal standard.

B. *Nollan* Requires Some Standard Of Proportionality To Justify Imposing Developmental Exactions Without Just Compensation

Initially, most courts and commentators interpreted the decision of this Court in *Nollan* as requiring a higher standard of judicial scrutiny for exactions than that heretofore required by the California courts. *See* Pet. for Cert. at 23-25. In *Commercial Home Builders v. Sacramento*, 941 F.2d 872 (9th Cir. 1991), a panel from the Ninth Circuit doubted whether *Nollan* had done anything to change the standard of scrutiny applicable to exactions. Subsequent to this Court's summary affirmance of *Commercial Home Builders*, *see* 112 S. Ct. 1997 (1992), a small number of jurisdictions appear to be vying with each other to see how far they can go before this Court will intervene.[21] The case at bar goes pretty far. At oral

---

[20] While the city has consistently attempted to characterize Mrs. Dolan's claim as an assault on the factual basis of the city's "findings," the assertion is belied by the decisions of the Oregon courts which at all levels treated, and decided, the question as a matter of law. *See* Pet. Cert. Reply Brief at 3-4.

[21] Aside from the case at bar, two other recent cases are particularly troubling. *Cf. Pengilly v. Multnomah County*, 810 F. Supp 1111 (D.Or. 1992) (sustaining a blanket exaction requiring all persons who
(continued...)

argument before the Oregon Court of Appeals, the city conceded that Mrs. Dolan would be required to dedicate the same amount of land ***even if they were proposing to erect a "15 cubic foot fruit stand"*** instead of a 17,600 square foot building. *See* Petition For Review in Oregon Supreme Court at 24, *citing* Audio R. Tape, *Dolan v. City of Tigard*, 113 Or.App., 832 P.2d 853 (1992), argued 4-13-92, Cue No. 40.[22] While part II of the *Nollan* decision was couched in the terms peculiar to the argument in that case, it is clear that the underlying question was one of proportionality. The dissent clearly recognized that *Nollan* was requiring a closer relationship between the burden created by a proposed development and the condition imposed under the state's police power to mitigate that burden, than the California courts had hitherto required.

---

[21](...continued)
happen to improve land adjacent to a public road to dedicate additional right—of—way); *and Ehrlich v. City of Culver City*, 15 Cal App 4th 1737 (2nd Dist. CA 1993), *petition for cert. filed*, 62 U.S.L.W. 3410 (U.S. Nov. 24, 1993)(No. 93-842)(sustaining impact fee based on loss of "recreational opportunities" ostensibly created by developer's discontinued operation of an unprofitable recreational facility).

[22] Thus, the case at bar represents precisely the sort of blanket exaction which the New Hampshire Supreme Court characterized as an "out-and-out plan of extortion" in *J.E.D. Associates, Inc. v. Atkinson*, 121 N.H. 581, 584, 432 A.2d 12, 14-15 (1981). *See also*, *Nollan v. California Coastal Comm'n*, 483 U.S. at 837. In response to Judge Richarson's (the presiding judge on the Oregon Court of Appeals) perplexed query, the city responded by protesting that, in the city's view, this was an as-applied, not a facial claim. Aside from the fact that the city's narrow characterization of Petitioner's claim is not true, *see* note 20, *supra*, it is difficult to see why this distinction should be any more determinative in this case than was the distinction between taking by regulation and taking by physical invasion in *Yee v. City of Escondido*, 112 S.Ct. at 1532. Indeed, since a facially confiscatory law violates Petitioner's rights "no matter how it is applied," *ibid*, it follows that it also violates Petitioner's rights ***as applied*** merely because it ***is*** applied, or, in the case of a claim for declaratory judgment, merely because its application is threatened. *See Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978) (claim for declaratory judgment need not accrue to be ripe for judicial review).

Cf. Nollan, 483 U.S. at 842 (Brennan, J., dissenting) ("The Court finds this an illegitimate exercise of the police power, because it maintains that there is **no reasonable relationship between the effect** of the development **and the condition imposed**"); and *id.* at 865 (Blackmun, J., dissenting) ("I disagree with the Court's rigid interpretation of the **necessary correlation between a burden** created by development **and a condition** imposed pursuant to the State's police power **to mitigate that burden**") (emphasis added). Thus, in part III of the *Nollan* opinion, this Court relied on numerous state court decisions applying different proportionality standards. *See Nollan*, 483 U.S. at 839-40 (citing cases). While the *Nollan* Court disclaimed the need to decide **which** standard of proportionality should be applied to exactions, 107 S.Ct. at 3149, it arguably did require the application of at least **some** standard.

This Court's summary affirmance of *Commercial Home Builders v. Sacramento*, *supra*, is not to the contrary. Despite its verbal formulations to the contrary, the Ninth Circuit arrived at its decision in that case only after the city presented:

> a *careful study* reveal[ing] the *amount* of low-income housing that would likely become necessary as a direct result of the influx of workers that would be associated with the new nonresidential development. It assesses only a *small portion* of a *conservative estimate* of the cost of such additional housing.

941 F.2d at 874 (emphasis added). In other words, the exaction in that case *did* satisfy a heightened level of scrutiny.

The case at bar illustrates why heightened scrutiny should be required of exactions. The City of Tigard has found that it is "reasonable to assume that customers and employees of the future uses of this site could utilize a pedestrian/bicycle pathway adjacent to this development for their transportation and recreation needs." Pet. App. at A-5, 6, quoting City of Tigard Planning Commission Final

Order No. 91-09 PC at 13, 20-21. And the majority of the Oregon Supreme Court believes that this "finding" should be sufficient to sustain the exaction in the case at bar. And yet, virtually the same finding could have been made if the city were proposing to construct a six-lane interstate freeway through Mrs. Dolan's lot. Surely, if the city were to build such a freeway, it would be "reasonable to assume" that Mrs. Dolan's customers would use it. Virtually ***every*** public improvement can be said to benefit *in some sense* ***both*** the developer and the general public. Under the standard adopted by the Oregon Supreme Court in the case at bar, virtually every exaction would be upheld.

In his dissenting opinion, Justice Peterson draws our attention to the growth in population currently experience by the State of Oregon and it is perhaps as a reaction to the perceived onslaught of *hoi polloi* that we are to attribute the highly deferential approach to exactions adopted by the majority on the Oregon Supreme Court.

Considered in its best light, the City of Tigard may be merely attempting to make those who intensify the use of their land to assume responsibility for the public consequences of their private actions. On the other hand, we know that governments at all levels are experiencing a shortage of funds due to the current restructuring in our national economy. Congress and state legislatures have an unfortunate propensity to impose mandates on local governments without providing the funds necessary to implement the mandates. And there is also strong public sentiment in virtually every corner of our nation against raising taxes. Local governments are all too often faced with tremendous pressures to shift the burden for needed public improvements onto some narrow segment of society. Developmental exactions are a particularly attractive alternative because their cost is paid for primarily by future residents who cannot as yet vote. They are also among the exclusionary devices commonly used by existing communities to keep certain people out (particularly those

who make less money than the current residents do).[23] Were it not for the impact fees which the city also is requiring Mrs. Dolan to pay for essentially the same needs (*see* note 1, *supra*), it might have been difficult to determine on present reading whether the City of Tigard is attempting to make Mrs. Dolan to pay her fair share, or whether it is attempting to accomplish some illicit purpose under the guise of the police powers. The city's own estimates of Mrs. Dolan's contribution to the needs ostensibly justifying the exaction in the case at bar place

---

[23] *See State Housing Council v. City of Lake Oswego*, 48 Or. App. 525, 617 P.2d 655 (1980), *appeal dismissed*, 291 Or. App. 878, 635 P.2d 647 (1981) (acknowledging price increasing effects of impact tax on housing affordability but declining to subject tax to statewide planning goal concerning housing); and *Oakwood at Madison, Inc. v. Township of Madison*, 72 N.J. 481, 520-524, 371 A.2d 1192, 1211-1212 (1977) (striking subdivision cash payment as exclusionary). *See also*, *"Not In My Back Yard" Removing Barriers to Affordable Housing*, Report to President Bush and Secretary Kemp by the Advisory Commission on Regulatory Barriers to Affordable Housing (Washington 1991); *Final Report of the Governor's Task Force on--*Spectrum--*Housing For Economic Growth* at 28-29 (Maryland, December 1, 1990) ("Subdivision regulations can increase the direct cost of land by requiring land improvements and exactions —— particularly considering the increased tendency of local and county governments to negotiate substantial developer contributions and exactions as a condition for plat approval... In some cases subdivision regulations require improvements that exceed the demands of the prospective residents raising serious questions about the legality of these requirements on developers and the subsequent additional costs to a unit of housing"); Bay Area Council, *Taxing the American Dream: Development Fees and Housing Affordability in the Bay Area*, 14 (1988) (urging San Francisco Bay Area cities to consider exempting low income housing from impact fees); *The Report of the Presidents Commission on Housing*, reprinted in F. Strom, editor, *1983 Planning and Zoning L. Rep.* §§ 17.01, 17.04[5][e] (1983); and Heyman and Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions*, 73 Yale L.J. 1119, 1155 (1964). While there is no suggestion that the city here is motivated by anything other than the desire to obtain the needed public improvements without having to pay for them, the standard adopted by this Court in resolving this case will nevertheless be applied under circumstances and in locations where exclusionary sentiments are more pronounced.

the question beyond doubt. Even aside from the question of these impact fees, we know that other communities have survived more intense growth pressures than the State of Oregon currently does without suspending constitutional guarantees.[24] We also know that there are sound reasons of public policy for applying a heightened standard of judicial scrutiny to developmental exactions. As Justice Peterson suggested, "If in the fact the government needs to take part of a landowner's property because of intensified uses of the developed property, imposing the burden of showing precisely why the need in fact exists is a modest burden to place on the government." Pet. App. at A-29.

C. The Exactions Placed By The City of Tigard On The Dolans' Development Proposals Are Akin To Special Assessments And Are Thus Invalid Because They Are Imposed Under A General Rule Which Makes It Possible For The Assessment To Exceed The Benefit To The Land In Question, And Because The City Has Failed To Apportion The Costs According To The Benefits Received.

The principle of just compensation was not well established among the states prior to the Revolution; and while outright rejection of the principle among state courts seems to have been confined to the first few decades of the nineteenth century, practices inconsistent with the principle continued among the states for some time. *See Lucas v. South Carolina Coastal Council*, 112 S. Ct. at 2914-2917

---

[24] Between July 23, 1959, and March 15, 1963, for example, the Village of Menomonee Falls, Wisconsin, approved 41 plats containing 638 lots. The village's population increased from 6,262 in 1950 to 18,276 in 1960, and to a then estimated population of 25,000 in 1964. *Jordan v. Village of Menomonee Falls*, 137 N.W.2d at 444. The Wisconsin Supreme Court ***sustained*** the park and school exaction there called into question under what we would now call the "rational nexus" test. Clearly, legitimate exactions have nothing to fear from meaningful judicial scrutiny.

(Blackmun, J., dissenting) (citing authorities). Gradually the principle of just compensation took hold, however, and by 1871, this Court could state that it had become "so essentially a part of American constitutional law that it is believed that no State is now without it...." *Pumpelly v. Green Bay Company*, 80 U.S. 166, 177 (1871).

As states incorporated formal just compensation clauses into their state constitutions, heretofore accepted practices became matters of constitutional concern.[25] While there are a few nineteenth century cases suggesting the application of the principle of just compensation to governmental regulation,[26] much of the early litigation seems to have focused on injuries sustain through the operation of municipal corporations. The construction and the operation of roads and railroads seems to have received much of the early attention.[27] Another common practice that evoked considerable early litigation, was the custom of financing needed public improvements by means of special assessments. *See Norwood v. Baker*, *supra* (citing many early cases).

Courts had little difficulty distinguishing the power of eminent domain from the power of taxation. "Taxation exacts money or services from individuals, as and for their respective shares of contribution to any public burthen [as

---

[25] Prior to the adoption of the Fourteenth Amendment, the Just Compensation Clause of the United States Constitution applied only to the federal government, and not to the states. *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

[26] *See, e.g., Moale v. Baltimore*, 5 Md. 314 (1854) ("[W]e regard the provision of the act of 1817 [*sub judice*] which denies to the proprietor the use of his land, as nothing short of an act of confiscation"); and *Aldrich v. Wright*, 53 N.H. 398, 421 (1873) (right to protect property may not be taken without just compensation).

[27] *See, e.g., Transportation Co. v. Chicago*, 99 U.S. 635 (1878); *Baltimore & P.R.R. v. Fifth Baptist Church*, 108 U.S. 317, 332, (1883); and *Richards v. Washington Terminal Company*, 233 U.S. 546 (1914) and the cases therein cited.

in original]," as one early court put it; but "[p]rivate property taken for public use by right of eminent domain, is taken not as the owner's share of contribution to a public burthen, but as so much beyond his share." *People v. Brooklyn*, 4 Comstock 419, 423 (1851). Some 40 years later this Court described the values underlying the Fifth Amendment's Just Compensation Clause in comparable terms. *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893) (Fifth Amendment intended to prevent government from taking "something more and different from that which is exacted from other members of the public"). *See also*, *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Because something special was taken by means of eminent domain, courts reasoned that special compensation also was required.

The problem with special assessments is that not only is property literally ***taken*** by means of them, but it is taken in a manner that is ***new*** and ***different*** from what is required of the general public. Why then should not just compensation be paid? The general conclusion of the early litigation on the subject, subsequently adopted by this Court, is that, while a municipality may estimate the benefits received by a fair rule, *French v. Barber Asphalt Paving Co.*, 181 U.S. 324 (1901) (front footage method may be used to estimate benefits where all lots are similarly situated and of the same size),[28] a special assessment may be justified only if based on the ***special*** benefits received. *Norwood v. Baker*, 172 U.S. at 279; and *Myles Salt Co. v. Board of Commissioners*, 239 U.S. 478 (1916). *See also*, McQuillan, 14 *Municipal Corp.* § 38.02.10, at 29 (3rd. ed. 1987).[29] A comparable approach is taken

[28] *See*, *ibid*, 181 U.S. at 345 ("[A]ll of the lots abutting [on Forest avenue] front on the same street and extend back therefrom uniformly to the depth of an ordinary city lot to an alley").

[29] Michelman and Sandalow question the continued viability of the *Norwood-Myles Salt* principle since, in their view, this Court has not relied on this principle since *Myles Salt*. *See* Michelman & Sandalow, (continued...)

concerning police power regulations governing the establishment of drainage and irrigation districts, *Wurts v. Hoagland*, 114 U.S. 606, 611 (1884); *Fallbrook Irrigation District v. Bradley*, 164 U.S. 112 (1896), and the erection of "party walls" and "partition fences." *Jackman v. Rosenbaum Co.*, 263 Pa. 158 (1919); and *Wurts v. Hoagland*, 114 U.S. at 611. Finally, in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), Justice Holmes applied this doctrine to the Kohler Act.[30]

[29](...continued)
Government in Urban Areas, at 524 n.114 (1970). Aside from the fact that their conclusion derives from an erroneous factual premise, *see Nashville, C. & St. Ry. v. Walters*, 294 U.S. 405, 430 (1935), citing, *inter alia*, *Myles Salt*, the argument seems to assume that a decision by this Court loses its viability unless buttressed by an occasional footnote in the U. S. Reports. In view of this Court's decision in *United States v. Alvarez-Machain*, 112 S.Ct. 2188 (1992), relying, *inter alia*, on *United States v. Rauscher*, 119 U.S. 407 (1886) and *Ker v. Illinois*, 119 U.S. 436 (1886), this assumption would not seem a particularly prudent one.

[30] *Cf.*, *ibid*, 260 U.S. at 415 ("It is true that in *Plymouth Coal Co. v. Pennsylvania*, 232 U.S. 531, it was held competent for the legislature to require a pillar of coal to be left along the line of adjoining property.... But that was a requirement for the safety of employees invited into the mine, and secured an ***average reciprocity of advantage***..."); *with ibid*, 260 U.S. at 422 (Brandeis, J., dissenting):

> The conclusion seems to rest upon the assumption that in order to justify such exercise of the police power there must be 'an average reciprocity of advantage' as between the owner of the property restricted and the rest of the community... Reciprocity of advantage is an important consideration, and may even be an essential, where the State's power is exercised for the purpose of conferring benefits upon the property of a neighborhood, as in drainage projects, *Wurts v. Hoagland*, 114 U.S. 606; *Fallbrook Irrigation District v. Bradley*, 164 U.S. 112; or upon adjoining owners, as by party wall provisions, *Jackman v. Rosenbaum Co.*,[*supra*]. But where the police power is exercised, not to confer benefits upon property owners but to protect the public from detriment and danger, there is, in my opinion, no room for considering reciprocity of advantage.

(continued...)

In his dissenting opinion to this Court's decision in *Lucas v. South Carolina Coastal Council*, Justice Stevens stressed the importance of the concept of "singling out" in takings jurisprudence. 112 S.Ct. at 2923-24 (Stevens, J. dissenting).[31] While the majority disagreed with Justice Stevens' application of this principle to the case then at bar, it did agree that the concept of "singling out" was an important principle within the context constitutional adjudication under the Just Compensation Clause. *Ibid*, 112 S.Ct. at 2899 n. 14.

Zoning law has developed over the past three quarters of a century on the basis of concepts derived in large measure from nuisance law.[32] And, while courts have

---

[30](...continued)
See also Chicago B. & Q. R. Co. v. Illinois ex rel. Grimwood, 200 U.S. 599 (1906) (Brewer, J., dissenting) (lamenting the lack of "***reciprocal benefits***" in that case)(emphases added).

[31] *Amici* are not certain whether Justice Stevens intends for us to understand the concept of "singling out" in the same sense, or by analogy to, the concept of proportionality under the law of special assessments. He does cite *Nollan* and *Pennell v. San Jose, supra*, to illustrate the precept. *Lucas v. South Carolina Coastal Council*, 112 S.Ct. at 2923 (Stevens J., dissenting). In any event, *amici* believe that the principle which Justice Stevens urges might better be applied by looking at the *political* rather than geographic distribution of burdens incident on a regulation. A regulation may apply across a broad geographic cross-section without seriously impacting on a broad cross-section of the electorate, or at least on a broad enough cross-section of the parliamentary majority to effect a change in public policy.

[32] *See* Daniel R. Mandelker & Roger Cunningham, *Planning and Control of Land Development: Cases and Materials*, at 33-50 (3rd ed. 1990) (discussing exemplary nuisance cases). This is not to say that zoning law has ever been understood to be ***limited*** to the confines of nuisance law. It is merely that nuisance law more often than not has provided the conceptual framework within which zoning law's substantive values were articulated. This practice of drawing analogies from nuisance law was itself sanctioned by this Court in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. at 387 ("And the law of (continued...)

sometimes conceded the relevance of Justice Holmes concept of "mutual reciprocity of advantage," they have yet to agree on a consistent rationale for applying this principle within the context of traditional zoning laws. The case at bar, however, concerns a context to which the concepts of "singling out" and "proportionality" have long been applied with particular stricture. While cases such as *Norwood* and *Myles Salt*, cited above, were decided under substantive due process principles, and while this Court has acknowledged that the standards for determining a taking under the Due Process and Just Compensation clauses are not necessarily the same, *Nollan v. California Coastal Commission*, 483 U.S. at 834 n.3, generally, this Court has distinguished between the standards applied under the Due Process and Just Compensation clauses with a view towards conferring *added* protection under the latter. At a minimum, this Court's cases establish that some fair standard of apportionment of the public and private contributions of any need is required before a special assessment, or a regulation closely resembling a special assessment, may be sustained.

The rational nexus test, as it is now understood since *Wald Corp. v. Metropolitan Dade County, supra*,[33] provides the most workable framework for evaluating developmental exactions. It is a standard that provides substantial protection to property owners from "taking by subterfuge" and yet has proved workable in practice.[34] It places a

---

[32](...continued)
nuisances, likewise, may be consulted, not f [32]or the purpose of controlling, but for the helpful aid of its analogies in the process of ascertaining the scope of, the power").

[33] *See* discussion, *supra*, at p. 9.

[34] The refrain that "government scarcely could go on" is almost invariably canted as a defense in these circumstances, *ie.* when a particular government agency is left without any legitimate defense. Since there are so many states that have now adopted the rational nexus test and ***have*** continued to "gone on," *see* White, *Development* (continued...)

substantial, but not unreasonable, burden on municipal governments to justify their dedication requirements by showing how the dedication requirements or impact fees are proportionally related to the impacts caused by the developer. It also comes with a body of case law to guide in its application. *See* discussion *supra* at pp. 10-13. Even assuming, *arguendo*, that *Nollan* does not require application of the "rational-nexus" or "proportionally related" test, this test is certainly consonant with *Nollan*. The decision by the Oregon Supreme Court below certainly is not.

CONCLUSION

For the foregoing reasons and those specified in the brief for petitioner, *amici curiae* urge this Court to reverse the Oregon Supreme Court.

Respectfully submitted.

Daniel J. Popeo
Paul D. Kamenar
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, D.C. 20036
(202) 588-0302

Date: January 13, 1994

---

[34](...continued)
Fees and Exemptions for Affordable Housing: Tailoring Regulations to Achieve Multiple Public Objectives in Young, *1992 Zoning and Planning Law Handbook*, 301, 310 (1992) (noting that the "rational nexus" test is fast becoming the majority rule in the United States), it would now seem difficult to argue that the adoption of this standard by this Court will bring about the end of modern civilization as we know it.